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In the Supreme Court of the United States

OCTOBER TERM, 1983

ANTONIO MARTINEZ CRUZ,

Petitioner

V.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not Petitioner Antonio Martinez Cruz was denied due process in the trial court in view of the prosecutor's misconduct consisting of:

A. In his opening statement, the prosecutor informed the jury that Appellant had violated the law in a similar fashion on other occasions.

B. The prosecutor elicited testimony from the Government witnesses as to other alleged similar occurrences before he had even gone into evidence on the charges on which Appellant was being tried.

C. The prosecutor elicited testimony from a Government witness that Appellant had "a long record."

D. The prosecutor injected into the case testimony to the effect that the co-defendant had pled guilty without explaining what it was that they had pled guilty to.

E. The prosecutor made improper jury argument.

F. The prosecutor obtained identification evidence by leading his witness.

2. Whether or not, the statute under which Petitioner Antonio Martinez Cruz was convicted is constitutional in view of the fact that it places the burden on the accused of making complicated determinations of law with respect to who is and who is not an illegal alien, this being an area of law on which even experts often disagree.

Petitioner contends that both points involved violations of the due process clause of the Fifth Amendment of the United States Constitution.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

(Fifth Circuit Court of Appeals No. 82-2557)

ANTONIO MARTINEZ CRUZ,

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

ANTONIO MARTINEZ CRUZ, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Fifth Circuit Court of Appeals entered in the above entitled and numbered case on June 23, 1983. Motion for Rehearing was filed by Appellant Antonio Martinez Cruz thereafter and same was denied by order of the Fifth Circuit Court of Appeals dated August 11, 1983. Petitioner Antonio Martinez Cruz thereafter filed a Motion for Stay of the Mandate in the Fifth Circuit Court of Appeals and said motion was granted through September 12, 1983 with the proviso that such stay would continue in force until final disposition of this case by the Supreme Court upon

the filing of a certificate by the Clerk of the Supreme Court with the Clerk of the Fifth Circuit Court of Appeals showing that this Petition for Writ of Certiorari has been filed in the Supreme Court of the United States.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is attached hereto as Appendix A.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals is attached hereto as Appendix B. The judgment of the Fifth Circuit Court of Appeals was entered on June 23, 1983. A Motion for Rehearing was filed on July 7, 1983. The Motion for Rehearing was overruled by the Court on August 11, 1983, as per copy of Order attached hereto as Appendix C. Thereafter on August 11, 1983 Petitioner Antonio Martinez Cruz filed his Motion for Stay of the Mandate in the Fifth Circuit Court of Appeals and same was granted as shown on attached Order dated August 24, 1983, copy of which is attached hereto as Appendix D.

The jurisdiction of the Supreme Court is invoked under the provisions of Title 28, Section 1254(1), United States Code Annotated.

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not Petitioner Antonio Martinez Cruz was denied due process in the trial court in view of the prosecutor's misconduct consisting of:

A. In his opening statement, the prosecutor

in formed the jury that Appellant had violated the law in a similar fashion on other occasions.

B. The prosecutor elicited testimony from the Government witnesses as to other alleged similar occurrences before he had even gone into evidence on the charges on which Appellant was being tried.

C. The prosecutor elicited testimony from a Government witness that Appellant had "a long record."

D. The prosecutor injected into the case testimony to the effect that the co-defendant had pled guilty without explaining what it was that they had pled guilty to.

E. The prosecutor made improper jury argument.

F. The prosecutor obtained identification evidence by leading his witness.

2. Whether or not, the statute under which Petitioner Antonio Martinez Cruz was convicted is constitutional in view of the fact that it places the burden on the accused of making complicated determinations of law with respect to who is and who is not an illegal alien, this being an area of law on which even experts often disagree.

Petitioner contends that both points involved violations of the due process clause of the Fifth Amendment of the United States Constitution.

STATUTE INVOLVED

The statute involved herein is Title 8, Section 1324(a) United States Code Annotated which reads as follows:

"(a) Any person, including the owner, operator, pilot,

master, commanding officer, agent, or consignee of any means of transportation who—

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, to attempts to transport or more, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or explusion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection

occurs: Provided, however, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

STATEMENT OF THE CASE

Petitioner Antonio Martinez Cruz was convicted of conspiracy to transport illegal aliens and of aiding and abetting of the transportation of illegal aliens. He was sentenced to serve three years on each count, to run concurrently with one and other. The opinion of the Fifth Circuit Court of Appeals which is attached hereto as Appendix A, contains a statement of the facts in the case.

REASONS FOR GRANTING WRIT

Petitioner did not have the fair trial guaranteed to him by the due process clause of the Fifth Amendment to the United States Constitution. For this reason, this petition for Writ of Certiorari should be granted.

Petitioner says furthermore that the Supreme Court should grant his Petition for Writ of Certiorari because the statute involved—Title 28 USCA, Section 1324(a)—is unconstitutional in that it places the burden on one accused of violating such statute of making complicated determinations of law with respect to who is and who is not legally within the United States. Petitioner says that such statute is basically and patently unfair and violates the due process provisions of the Fifth Amendment to the United States.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

OSCAR J. PENA, SR.
P.O. Box 1324
Laredo, Texas 78042-1324

Attorney for Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served upon the Solicitor General, Department of Justice, Washington, D.C. 20530 by mailing a copy of same to him this 7th day of September, 1983 and that a copy of said petition has likewise been served upon the U.S. Attorney, Southern District of Texas, by mailing a copy to the U.S. Attorney at 515 Rusk, Houston, Texas, this day.

OSCAR J. PENA, SR.
Attorney for Petitioner

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-2557
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTONIO MARTINEZ CRUZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(June 23, 1983)

Before RUBIN, JOHNSON and WILLIAMS, Circuit Judges.

PER CURIAM:

Appellant, Antonio Martinez Cruz, was convicted upon trial by jury of one count of conspiracy to transport illegal aliens in violation of 8 U.S.C. § 1324(a)(2) and 18 U.S.C. § 371, and three counts of aiding and abetting the transportation of illegal aliens in violation of 8 U.S.C. § 1324(a)(2) and 18 U.S.C. § 2. He was sentenced to three

years imprisonment on each count, to run concurrently. Cruz filed timely notice of appeal.

The evidence at trial showed that in early September 1982, three Mexicans illegally entered the United States from Nuevo Laredo by crossing the Rio Grande river in an inner tube. After the three aliens crossed, their guide took them to wait at a place in the brush. After about ten minutes a car arrived and took them to appellant's home. The three Mexicans stayed at Cruz's home for a day and a night. They slept in a car and truck by night and stayed inside the house by day. Cruz was present part of the time.

On the evening of September 4, 1982, Cruz telephoned Glen Simpson and asked him if he wanted to take "tres mojados" or "three wets" to Houston. Simpson then telephoned Gary Hatfield and asked him if he wanted to make some money by taking a load of illegal aliens. Hatfield drove to Simpson's house, picked him up, and then drove to Cruz's house. Finding that Cruz was not at home, Hatfield and Simpson drove to a welding shop and found Cruz. Cruz gave them $100 for expenses. At about 9:00 that evening Simpson and Hatfield returned to Cruz's hosue where they picked up the three Mexicans. It was understood they were to drive the three aliens to Houston. Upon their return, Simpson and Hatfield were to be paid $125 per alien by Cruz. They understood that Cruz would make $250 per alien.

Simpson and Hatfield started for Houston with the Mexicans in the back seat. After a few blocks they stopped at a dark place and put the Mexicans in the trunk. Government officials stopped the car shortly thereafter at a checkpoint, found the Mexicans, and arrested Simpson and Hatfield.

The evidence also showed that Simpson and Hatfield had driven illegal aliens to Houston for Cruz twice before within the previous month.

I.

Cruz first argues that the government failed to prove beyond a reasonable doubt that he was guilty of conspiracy to transport illegal aliens. In reviewing such a contention the reviewing court must view all evidence, direct and circumstantial, in the light most favorable to the government, and must accept all reasonable inferences that tend to support the jury's verdict. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Magana-Arevalo*, 639 F.2d 226, 228 (5th Cir. 1981). The standard of review of sufficiency of the evidence is whether a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. *United States v. Bell*, 678 F.2d 547, 549 & n.3 (5th Cir.) (en banc), *cert. granted on other grounds*, 103 S.Ct. 444 (1982), *see* 51 U.S.L.W. 3452 (U.S. Dec. 7, 1982) (No. 82-5119).

The Supreme Court has held that "[c]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent necessary for the substantive offense itself." *Ingram v. United States*, 360 U.S. 672, 678, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959) (emphasis in original). We, therefore, rely upon the essential elements of the crime of transporting illegal aliens under 8 U.S.C. § 1324(a)(2). They are (1) the defendant transported an alien within the United States, (2) the alien was in the United States illegally, (3) the defendant knew this, (4) the defendant knew or had reasonable grounds to believe that the alien had entered the United States within three years, and (5) the defendant acted willfully to further

the alien's violation of the law. *United States v. Shaddix*, 693 F.2d 1135, 1137-38 (5th Cir. 1982).

Cruz contends that the government failed to prove the third, fourth and fifth elements. A review of the record shows that this contention is without merit. The evidence was sufficient to show that Cruz knew that the aliens were in the country illegally. When he telephoned Simpson, Cruz referred to the aliens as "mojados" or "wets". His offer to pay Simpson and Hatfield $125 for driving the three aliens to Houston suggests that he knew that they were not ordinary passengers. In addition, Cruz had recently hired the same drivers to take illegal aliens to Houston two times before. A reasonable jury could have found beyond a reasonable doubt from this evidence that Cruz knew the aliens were in the United States in violation of the law.

The evidence that Cruz knew that the aliens had entered within the last three years was also sufficient. That the aliens arrived without luggage at his house, which was only four blocks from the river, supports such an inference. *Cf. Shaddix*, 693 F.2d at 1138 (Hispanic individuals with cloth sacks sixty miles from the border). These circumstances and the evidence that Cruz arranged to have the aliens driven to Houston were sufficient to establish the fourth element of the crime.

The evidence that Cruz acted to further the illegal aliens' violation of the law was sufficient as well. The aliens entered the country illegally and wished to travel to Houston in order to find work. Cruz hid them at his house and arranged their passage to Houston as he had done for two other groups of illegal aliens. He offered to pay the drivers $125 per alien for the trip. From this evidence the jury could have found beyond a reasonable doubt that Cruz

acted to further the aliens' illegal purpose.

II.

Cruz next contends that the evidence failed to show beyond a reasonable doubt that he was guilty of aiding and abetting Hatfield in the transportation of the three illegal aliens as charged in the three substantive counts of the indictment. He asserts that proof failed that Hatfield had committed the substantive offenses, or that Cruz had aided or abetted him. This contention is without merit. Hatfield drove the car with the aliens as passengers. He had carried illegal aliens on two previous trips, and he expected to be paid $125 per alien for the trip. He also testified that he believed Cruz would receive twice this amount. Hatfield hid the aliens in the trunk of the car. In addition, Simpson had told him that the passengers were illegal aliens. This evidence was sufficient to support a finding that he had violated 8 U.S.C. § 1324(a)(2). The evidence that Cruz aided and abetted Hatfield was equally strong. Appellant had called Simpson who asked Hatfield to make the trip. He gave both of them money for expenses, allowed them to pick up the aliens, and promised to pay them upon their return. There was sufficient evidence to support the conviction on the substantive counts.

III.

Next, Cruz argues that he was deprived of due process because his trial was infected by the improper admission of evidence and also improper argument and instructions. Cruz does not challenge the admission of evidence of his prior acts and his prior conviction for the purpose of showing intent and knowledge. *See* Fed.R.Evid. 404(b); *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978)

(en banc), *cert. denied*, 440 U.S. 920 (1979). He contends that the evidence was admitted too early, before the question of intent was raised. It was clear at the outset of the trial that intent and knowledge would be at issue in the instant case. The evidence showing these elements was wholly circumstantial. In these circumstances, this Court has held that admission of the extrinsic offenses in the government's case-in-chief as proper. *United States v. McMahon*, 592 F.2d 871, 876 (5th Cir.), *cert. denied*, 442 U.S. 921 (1979). In addition, the trial court directed the government to introduce evidence of the extrinsic offenses only after proof had been submitted of the offenses charged. Further, the court carefully instructed the jury on the limited purpose of such evidence. We find no error.

Cruz asserts that the government did not prove the extrinsic offenses by clear and convincing evidence. His two co-conspirators testified that Cruz had hired them to transport illegal aliens. Also, the judgment in Cruz's misdemeanor conviction was introduced into evidence. This proof must be recognized as clear and convincing.

Cruz objects to an immigration official's testimony that Cruz had "a very long record" with the immigration service. Defense counsel did not object when the witness was asked whether Cruz had a record. He objected only after the question was answered. The court then immediately instructed the jury to disregard the testimony. Without deciding whether the reference to Cruz's record was improper, in any event there was no error since the improper admission of such evidence may be cured by appropriate limiting instructions. *United States v. Evans*, 575 F.2d 455, 484 (5th Cir.), *cert. denied sub nom, Gent v. United States*, 439 U.S. 870 (1978). *See Beechum*, 582 F.2d at 917 n.23 ("This is a context in which limiting instructions

are of substantial efficacy").

Cruz argues next that the trial court erred by admitting evidence that Cruz's alleged co-conspirators pleaded guilty without explaining what charge they had pleaded to. The trial court properly permitted the prosecutor to elicit the co-conspirators' pleas in view of defense counsel's expressed intention to cross examine on them. *United States v. Borchardt*, 698 F.2d 697, 700-01 (5th Cir. 1983). Actually, the jury was informed that the co-conspirators pleaded guilty to counts involving their fully described activities in this case. The court also instructed the jury not to consider the pleas as evidence of Cruz's guilt. There was no error.

Cruz's last complaint as to the conduct of the trial charges improper jury argument and the leading of witnesses by the prosecutor. The arguments concerning the definition of "mojados" was supported by the evidence. The prosecutor's references to Simpson and Hatfield as boys were not improper; they were twenty and twenty-one years old respectively. The trial court did not err by having Cruz stand so that one of the illegal alien witnesses could identify him. The court instructed the jury thoroughly, however, to take all relevant facts into account when evaluating the identification testimony. Cruz's contentions are without merit.

Finally, Cruz contends that the conspiracy count of the indictment should have been dismissed because the dates of two of the seven overt acts alleged were two years earlier than any acts proved at trial. The trial court had instructed the jury that they need find the commission of only one overt act beyond a reasonable doubt to find a conspiracy. After the jury retired to deliberate, it sent a note to the court stating that it had found a typographical error

in the indictment by placing overt acts #5 and 6 in 1980 rather than 1982. After consulting with the counsel for both sides, the court instructed the jury that the government was bound by the error. Because there was no evidence of any acts in September 1980, the jury was instructed to disregard overt acts #5 and 6. The court reinstructed the jury that the governmment had to prove at least one overt act.

Cruz has failed to show that he was prejudiced in any way by the court's action. The court instructed the jury that the government failed to prove two of the overt acts alleged. Cruz could only have benefitted from droppin two of the seven acts alleged. This final contention is without merit.

A careful review of the records reveals no error. The verdict of guilty on all counts and the sentence is

AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-2557
Summary Calendar

D. C. Docket No. L-82-257

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTONIO MARTINEZ CRUZ,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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Before RUBIN, JOHNSON and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is

hereby, affirmed.

June 23, 1983

ISSUED AS MANDATE: AUG 24, 1983

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-2557

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTONIO MARTINEZ CRUZ,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(AUGUST 11, 1983)

Before RUBIN, JOHNSON and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-2557

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTONIO MARTINEZ CRUZ,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ORDER:

☒ The motion of APPELLANT for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☒ The motion of APPELLANT for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including SEPTEMBER 12, 1983, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been

filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☒ The motion of_____for a further stay of the issuance of the mandate if GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

☒ The motion of_____for a further stay of the issuance of the mandate if DENIED.

_____

UNITED STATES CIRCUIT JUDGE